FILE COPY

No. 696

FILED
MAR 10 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

and

REPLY TO PETITIONER'S MOTIONS FOR LEAVE TO USE PRIOR RECORD AND TO PERFECT THE RECORD

J. LEE RANKIN,
Solicitor General,

ROBERT A. BICKS,
Acting Assistant Attorney General,

RICHARD A. SOLOMON,
Attorney,
Department of Justice,
Washington 25, D. C.

JOHN L. FITZGERALD,
General Counsel,

MAX D. PAGLIN,
Assistant General Counsel,

RUTH V. REEL,
Attorney,
Federal Communications Commission,
Washington 25, D. C.

INDEX

	Page
Brief for the Federal Communications Commission in Opposition	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	5
Conclusion	9
Reply to Petitioner's Motions for Leave to Use Prior Record and to Perfect the Record	11

CITATIONS IN BRIEF IN OPPOSITION

Cases:

Federal Broadcasting System, Inc. v. *Federal Communications Commission*, 225 F. 2d 560, certiorari denied *sub nom. WHEC* v. *Federal Broadcasting System, Inc.*, 350 U.S. 923	3, 4, 8
Federal Broadcasting System, Inc. v. *Federal Communications Commission*, 239 F. 2d 941	4
Mansfield Journal Co. v. *Federal Communications Commission*, 180 F. 2d 28	7
McClatchy Broadcasting Co. v. *Federal Communications Commission*, 239 F. 2d 15, certiorari denied, 353 U.S. 918	7
Pinellas Broadcasting Co. v. *Federal Communications Commission*, 230 F. 2d 204, certiorari denied, 350 U.S. 1007	7
Scripps-Howard Radio v. *Federal Communications Commission*, 189 F. 2d 677, certiorari denied, 342 U.S. 830	7
United States v. *Radio Corporation of America*, 358 U.S. 334	7
United States v. *Storer Broadcasting Co.*, 351 U.S. 192	7

Statute:

Communications Act, Sec. 309(c), 66 Stat. 715 (47 U.S.C. 309(c))	3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A1) is reported at 270 F. 2d 914. The decision of the Federal Communications Commission (S.J.A. 103)[1] is reported at 24 F.C.C. 147, and its memorandum opinion and order denying reconsideration (S.J.A. 191) is reported at 26 F.C.C. 178.

---

[1] "S.J.A." refers to the printed Supplemental Joint Appendix below.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action of the Commission, was entered on October 1, 1959. Orders were entered by Mr. Justice Black on December 31, 1959 and January 21, 1960, extending the time for filing a petition for certiorari until February 10, 1960. The petition for a writ of certiorari was filed on February 10, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Commission action granting construction permits for television stations to be operated in Rochester, N.Y., on a "share-time" basis,[2] was within the scope of its proper discretion in the light of the newspaper, radio and television interests already owned by one of the grantees.

STATUTE AND REGULATIONS INVOLVED

The pertinent provision of the Communications Act of 1934, as amended (47 U.S.C. 151, *et seq.*) and the Rules and Regulations of the Federal Communications Commission are set out in the petition at pp. 5-18.

STATEMENT

On March 11, 1953, the Federal Communications Commission, by a three to two vote of the Commis-

[2] By agreement between the applicants, and subject to approval by the Federal Communications Commission, operations by two stations on a single channel are shared by dividing the time of operation between them.

sioners present and participating, granted the applications of WHEC, INC. (WHEC) and Veterans Broadcasting Company (Veterans) for construction permits for television stations to operate on Channel 10 in Rochester, N. Y. on a share-time basis (Pet. A2-A3). Six days later, on March 17, the petitioner filed an application for Channel 10 and a protest, under Section 309(c) of the Communications Act, to the grant of the WHEC and Veterans applications (Pet. A3). The protest was originally set for hearing, but on reconsideration was denied on grounds that the petitioner had failed to specify with particularity "the facts, matters, and things relied upon" within the meaning of the then existing language of Section 309(c), 66 Stat. 715 (*ibid.*). The petitioner filed a petition for reconsideration of this action, citing newly discovered evidence purporting to indicate the invalidity of the Commission's original grant. The Commission denied the petition both as untimely, and, on the merits, as failing to state grounds for setting aside the grant (*ibid.*).

The petitioner appealed from both the denial of the protest and from the denial of its petition for reconsideration. On July 28, 1955, the court of appeals issued its opinion in that action, *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 225 F. 2d 560, certiorari denied *sub nom. WHEC* v. *Federal Broadcasting System, Inc.*, 350 U.S. 923. In its opinion (Pet. A2-A14), the court held the Commission had erred in concluding that the petitioner's protest lacked the requisite specificity and remanded the case to the Commission for further

hearing on the public interest considerations relevant to the grant of the WHEC and Veterans share-time permits (Pet. A4-A7). The court went on, however, to consider the various contentions the petitioner had made to the effect that it was "presently entitled to a comparative hearing * * * [because] the Commission's grant of a license to the intervenors is completely lacking in validity or effect" (Pet. A8). And in this part of the opinion the court rejected the petitioner's various procedural objections to the Commission's grant of March 11, 1953, including the failure to count a temporarily absent commissioner as voting against the grant, the expedited processing procedures under which the WHEC and Veterans applications (among numerous others) had been considered, and petitioner's alleged lack of knowledge thereof in time to file its own application (Pet. A7-A13). While certiorari from this opinion was unsuccessfully sought by intervenors (*WHEC* v. *Federal Broadcasting System, Inc.*, 350 U.S. 923), the petitioner itself made no effort to seek further review.

Pursuant to the mandate of the court of appeals, the Commission on February 24, 1956, designated the applications for hearing on issues reflecting the allegations in the protest.[3] These issues (S.J.A. 2-3), which without exception refer to the qualifications of WHEC and Veterans to be share-time licensees of

---

[3] The Commission's determination to keep the WHEC and Veterans authorizations in effect pending the further hearing was sustained by the court of appeals in *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 239 F. 2d 941 (C.A.D.C.).

television stations in Rochester rather than to the procedural validity of the Commission's original grants, were never objected to by the petitioner, nor did the petitioner seek their enlargement or modification. After full hearing on the issues the Commission, agreeing with the hearing examiner (S.J.A. 43-94), unanimously affirmed the grants (S.J.A. 103-158) and subsequently denied rehearing (S.J.A. 191-203). The court of appeals affirmed in a brief *per curiam* opinion (Pet. A1-A2).

ARGUMENT

1. One of the principal reasons advanced by the petitioner for seeking certiorari in the instant case is the alleged invalidity of the Commission's action in granting share-time use of one of the two VHF television channels assigned to Rochester[4] to interests owning the only local daily newspapers in Rochester and a number of other newspapers, radio and television interests, including an AM radio station in Rochester and three other radio stations and a television station in upstate New York (Pet. 26-30). The petitioner does not contend that there is anything in the Communications Act which in terms precludes a grant of a license under such circumstances, but it argues that the factual situation presented here is one of such "concentration of control of media of mass

[4] Of the four television channels assigned to Rochester for commercial purposes, stations are in operation only on the two channels in the very high frequency (VHF) portion of the radio spectrum, Channel 10 (in issue here) and Channel 5.

communication" that it was arbitrary and capricious for the Commission "to fail to conclude that the grant of a TV broadcast license would be contrary to the public interest" (Pet. 3). The rejection of this argument, which the petitioner recognizes is essentially an issue of "Public Policy" (Pet. 26), clearly does not warrant review by this Court.

The Commission, in the decision under review, carefully considered the facts concerning the various newspaper, radio and television interests owned by the Gannett interests, which control WHEC. Pointing to the number of other broadcast stations in Rochester not connected with Gannett (five AM radio stations, two FM radio stations and one full time VHF television station, in addition to the Veterans station which shares time with WHEC); the lack of any overlap between the service area of the other Gannett television station in New York and its proposed Rochester station; the non-existence of joint rates for advertisers using its newspapers as well as its radio and television facilities (represented by a separate advertising agency from the newspapers); and the lack of any record support for charges that the Gannett papers in Rochester had engaged in the suppression of news (S.J.A. 146-149), the Commission concluded that the record "does not support a conclusion that the grant of the application of WHEC, Inc., would result in a concentration of control contrary to the public interest or would create a 'communications monopoly' in Rochester as alleged" (S.J.A. 149). The court of appeals affirmed, finding the Commission had "weighed the factors relevant to this con-

tention and resolved the issue in a manner which we think in the circumstances was within its allowable discretion" (Pet. A2).

No legal question is presented here as to either the authority or duty of the Commission to give consideration to questions of diversity of ownership of the media of mass communications in an area in determining whether particular applications should be granted. See *Scripps-Howard Radio* v. *Federal Communications Commission*, 189 F. 2d 677 (C.A.D.C.) certiorari denied, 342 U.S. 830; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A.D.C.); *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 230 F. 2d 204 (C.A.D.C.), certiorari denied, 350 U.S. 1007; *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 239 F. 2d 15 (C.A.D.C.), certiorari denied, 353 U.S. 918; cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-203; *United States* v. *Radio Corporation of America*, 358 U.S. 334, 351-352. The sole question is the application of established principles to a particular fact situation. Since the Commission's determination was affirmed by the court below (Pet. A2), no further review is warranted.[5]

[5] The petitioner also objects to failure of the Commission's decision to resolve in terms the final issue in the protest proceedings—"To determine whether, in the light of the facts adduced upon the foregoing issues, the public interest, convenience, or necessity would be served by a grant of the application in question" (Pet. 5). The answer to this is that the Commission, having resolved each of the five "foregoing issues" adversely to petitioner, had no need to make

2. The other issues presented by the petition relate to questions affecting the validity of the Commission's original vote. These were resolved adversely to the petitioner in the 1955 decision of the court of appeals in case No. 12,252 (*Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 225 F. 2d 560). The petitioner sought no review of these determinations, and they formed no part of the issues or decision of the Commission in the hearing on the protest pursuant to the court of appeals remand. While the petitioner attempted to reopen these questions in its present appeal on the basis of certain alleged newly discovered evidence, there is no evidence that they were passed upon by the court below in its *per curiam* opinion affirming the Commission (Pet. A1-A2). Even assuming that these questions were once more decided against the petitioner, and thus are properly presented by the instant petition, it is clear that they relate to the validity of an isolated procedural action not likely to recur, and that the affirmance of the procedures followed by the Commission by the court below raises no questions of general importance warranting further review.

---

an overall reevaluation of the public interest which it had passed upon in originally making the grants to WHEC and Veterans.

CONCLUSION

The decision below is correct and presents no legal questions of substance. No conflict between circuits is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

JOHN L. FITZGERALD,
General Counsel,

MAX D. PAGLIN,
Assistant General Counsel,

RUTH V. REEL,
Attorney,
Federal Communications Commission.

MARCH 1960

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO PETITIONER'S MOTIONS FOR LEAVE TO USE PRIOR RECORD AND TO PERFECT THE RECORD

The Federal Communications Commission does not object to petitioner's motion for leave to use in this Court that portion of the official record of the Court of Appeals for the District of Columbia Circuit in Case No. 12,252 which is appended to petitioner's printed motion. The documents are part of the official public files of the court below and there would appear to be no reason to oppose reference to them, albeit we do not concede their relevancy to the petition for certiorari.

The Commission does, however, oppose petitioner's Motion to Perfect the Record. As the motion makes clear, a similar motion was made by petitioner in the Court of Appeals during the course of Case No.

12,252, but was denied by that court by order of July 29, 1954 (Mot. pp. 12-13). Case No. 12,252 terminated in a final decision of the Court of Appeals on July 28, 1955 (see *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 225 F. 2d 560 (C.A.D.C.), certiorari denied, *sub nom. WHEC, Inc.* v. *Federal Broadcasting System, Inc.*, 350 U.S. 923). No review of the action taken in that case was sought by petitioner, although the court in its opinion expressly rejected petitioner's challenge to the procedural validity of the Commission's vote—the point to which the Motion to Perfect the Record had been directed (see 225 F. 2d at pp. 565-568). Moreover, although petitioner in its present appeal from a subsequent order of the Commission reaffirming its decision, purported to raise once again the question of the validity of the Commission's original vote, it did not in this case seek authority from the Court of Appeals to perfect or otherwise correct the record filed therein by the Commission pursuant to the provisions of Section 402(d) of the Communications Act of 1934, as amended, 47 U.S.C. 402(d). (See Rule 37 of the Rules of the United States Court of Appeals for the District of Columbia Circuit). It is clear, therefore, that the present Motion to Perfect the Record is untimely.

The motion would be subject to objection even if it had been timely made to the Court of Appeals. For the material sought to be incorporated in the record ("all memoranda or notes in the possession of the Secretary of the Commission, the Minute Clerk of the Commission and the members of the Commission

* * * relating to the procedure and actual voting and participation of the individual Commissioners in the said meeting, and any draft copies of minutes circulated by the Secretary * * *" (Mott. pp. 8-9) are obviously the type of internal working papers of the agency which are not part of the final administrative record to be certified to the Court of Appeals under Section 402(d) of the Communications Act. See *United States* v. *Morgan*, 313 U.S. 409, 421-422; *Norris & Hirshberg* v. *Securities & Exchange Commission*, 163 F. 2d 689 (C.A.D.C.), certiorari denied, 333 U.S. 867; *Sanders Brothers Radio Station* v. *Federal Communications Commission*, 106 F. 2d 321 (C.A.D.C.), affirmed on this point, 309 U.S. 470 at 477-478; *National Labor Relations Board* v. *Ford Motor Company*, 118 F. 2d 766 (C.A. 9); *Berkshire Employees Ass'n* v. *National Labor Relations Board*, 121 F. 2d 235 at 238 (C.A. 3).

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JOHN L. FITZGERALD,
General Counsel,
Federal Communications Commission.

MARCH 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960 5A2498 1150